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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*  
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February 25, 2009

Dean Elena Kagan  
Harvard Law School  
Griswold 200  
1525 Massachusetts Avenue  
Cambridge, MA 02138

Dear Dean Kagan:

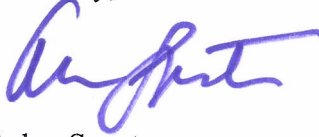
I write to express my dissatisfaction with many of the answers you provided to the Committee in response to my written questions following your confirmation hearing. I believe these answers are inadequate for confirmation purposes.

In a 1995 review of a book entitled *The Confirmation Mess*, you made a compelling case for senatorial inquiry into a nominee's judicial philosophy and her views on specific issues. You stated, "when the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public." You further asserted that the Senate's inquiry into the views of executive nominees, as compared to Supreme Court nominees, should be even more thorough, stating, "the Senate ought to inquire into the views and policies of nominees to the executive branch, for whom 'independence' is no virtue." I agree with the foregoing assessment, and, therefore, am puzzled by your responses, which do not provide clear answers concerning important constitutional and legal issues.

For example, in response to several questions related to the constitutionality of the imposition of the death penalty, you offer only the following: "I do not think it comports with the responsibilities and role of the Solicitor General for me to say whether I view particular decisions as wrongly decided or whether I agree with criticisms of those decisions. The Solicitor General must show respect for the Court's precedents and for the general principle of *stare decisis*. If I am confirmed as Solicitor General, I could not frequently or lightly ask the Court to reverse one of its precedents, and I certainly would not do so because I thought the case wrongly decided." You repeatedly provide this answer verbatim, or a similarly unresponsive answer, to numerous questions regarding the First and Second Amendments, property rights, executive power, *habeas corpus* rights of detainees, the use of foreign law in constitutional and statutory analysis, and the Independent Counsel statute, among others. I think you would agree that, given the gravity of these issues and the significance of the post for which you are nominated, this Committee is entitled to a full and detailed explanation of your views on these matters.

Please provide the Committee with adequate answers to these questions so that I may properly evaluate your nomination and determine whether any supplemental questions are necessary.

Sincerely,

A handwritten signature in blue ink, appearing to read 'A. Specter', with a stylized, cursive script.

Arlen Specter